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No. 71-1218

In the Supreme Court of the United States

OCTOBER TERM, 1971

AUCKLAND HOLMES AND JAMES OLIVER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial with others in the United States District Court for the Northern District of Illinois, petitioners were convicted of possessing, selling, and conspiring to sell heroin, in violation of 21 U.S.C. (1964 ed.) 174. They were each sentenced to twenty years' imprisonment. The court of appeals affirmed in a comprehensive opinion (452 F. 2d 249; Pet. App.) and thereafter denied a petition for rehearing on December 1, 1971. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to January 15, 1972. The petition was not filed until March 24, 1972, and is out of time under Rule 22(2) of the Rules of this Court.

465-754—72——1

Petitioners and co-defendants were convicted of substantive narcotics violations based on four heroin transactions on the South Side of Chicago. The first three transactions were heroin purchases from defendant Earl Matthews, which were negotiated and consummated by an informer, Hudson Bonner. The fourth transaction, witnessed by twelve government agents, was an attempted partial distribution of 8,000 grams of heroin by defendants Matthews and Pearman to defendants Oliver, Stephens and Westbrook (D. 2).[1]

1. Petitioners contend that the trial court erred in denying a request for a hearing to determine whether the testimony of a government informer, Willard Evans, should be suppressed on the ground that he had been masquerading as a defendant. The facts relating to this contention are set forth in the court's opinion at Pet. App. 19a–22a; see also Pet. App. 25a–26a.[2] In

[1] "D." refers to the two volumes of original documents on file with the Clerk of this Court. "Tr." refers to the forty-six volume trial transcript filed with the Clerk of this Court. The documents and transcript are filed with No. 71–5961, *Matthews* v. *United States*, certiorari denied, March 27, 1972.

[2] Evans, who was originally named as a defendant and whose case was severed on October 17, 1968, shortly before trial, volunteered to aid the government on April 10, 1967. He and four defendants had been arrested in March 1967 and were indicted by a grand jury in April 1967. A superseding indictment, naming additional defendants, was returned in October 1967. Information supplied by Evans proved significant in the indictment and conviction of only defendants Boysie Stephens and Wilbert Holmes. See brief in *Wilbert Holmes* v. *United States*, No. 71–937, certiorari denied, March 27, 1972.

On November 13, 1967, defendant Matthews was shot in the head by an unknown assailant (D. 46; Pet. App. 26a). On

addition we note only that, prior to the request for a rehearing, the trial judge and all defense counsel had heard uncontroverted testimony that neither Evans nor his counsel had participated in any way with other defense counsel in pre-trial preparations (Pre-Trial Volume A, 291–292). Moreover, petitioners' concern at trial was not that Evans had been a government informer, but rather that the other named defendants might subsequently be revealed as secret government informers (Tr. 220–221; Pet. App. 25a–26a).

2. The trial court properly refused to compel the government to disclose the identity of an informer who had reported that petitioner Oliver was nicknamed "Pee Wee." The nickname was significant only because petitioner Holmes' address book contained the name "Pee Wee" opposite a telephone number. Later in the trial the defense was able to establish conclusively that the telephone number in Holmes' book belonged to a girl friend of Holmes named "Pee Wee." Since the government's attempted connection of Oliver with the name and number in Holmes' book was effectively thwarted, the informer's possible testimony would have been superfluous and of no conceivable benefit to the defense. Indeed petitioner Oliver stated that he had no quarrel with the court's refusal

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November 17, 1967, defendant Pearman's motion to sever the case of defendant Evans on the ground that he was a government informer, having previously cooperated with the prosecution in a 1962 narcotics case, was denied (D. 9; Pet. App. 25a). Evans' wife had previously received telephone threats (Tr. 507). These circumstances prompted the government to conceal Evans' status as an informer.

to compel disclosure of the informer's identity (Tr. 6605).

3. Petitioners assert that testimony regarding conversations between defendant Matthews and informer Bonner, which government agents overheard and which implicated petitioner Holmes and others, violated the Sixth Amendment's confrontation clause. However, the continued validity of the joint venture exception to the hearsay rule has been consistently reaffirmed. *E.g., United States* v. *Cerone,* 452 F. 2d 274, 283 (C.A. 7), certiorari denied, February 28, 1972 (Nos. 71–720, 759, 760); *United States* v. *Rinaldi,* 393 F. 2d 97, 99 (C.A. 2), certiorari denied, 393 U.S. 913. Nor did the decision by Matthews' counsel not to cross-examine Bonner or the narcotics agents unduly affect petitioners in their defense. The narcotics agents were intensively cross-examined by other defense counsel; Bonner could have been cross-examined by petitioners' attorneys. As the court below stated, "Holmes must accept the consequences of his tactical decision not to cross-examine important witnesses" (Pet. App. 31a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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